FILED
No. 95 396 SEP 7 1995
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

ANTHONY E. JIMINEZ,

Petitioner,

v.

MARY WASHINGTON COLLEGE;
PHILIP HALL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANTHONY E. JIMINEZ,

Plaintiff-Appellee,

V. Record No. 94-1776

MARY WASHINGTON COLLEGE; PHILIP HALL,

Defendants-Appellants.

ANTHONY E. JIMINEZ,

Plaintiff-Appellant,

V. Record No. 94-1802

MARY WASHINGTON COLLEGE; PHILIP HALL,

Defendants-Appellees.

Appeals from the United States District Courtfor the Eastern District of Virginia, at Richmond.Richard L. Williams, Senior District Judge. (CA-93-459)

Argued: March 8, 1995

Decided: June 9, 1995

Before WELKINS and HAMELTON, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Reversed by published opinion. Judge Hamilton wrote the opinion, in which Judge Wilkins and Senior Judge Phillips joined.

JIMINEZ V. MARY WASHINGTON COLLEGE COUNSEL

ARGUED: Guy Winston Horsley, Jr., Senior Assistant Attorney General, OFFICE OF THE AT70RNEY GENERAL, Richmond, Virginia, for Appellants. Sa'ad El-Amin, EL-AMIN &'CRAWFORD, P.C., Richmond, Virginia, for Appellee. **ON BREEF:** James S. Gilmore, 111, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellants.

OPINION

HAMILTON, Circuit Judge:

Anthony Jiminez (Jiminez), a black professor from Trinidad, West Indies, instituted suit pursuant to Title VH of the Civil Rights Act of 1964, see 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994), and 42 U.S.C.A. §§ 1981, 1983 (West 1994), against Mary Washington College

and Philip Hall (Hall), Vice President of Mary Washington College (collectively MWC), for alleged employment discrimination based on race and national origin. According to Jiminez, he was impermissibly given a terminal contract instead of remaining in a tenure-track teaching position. Following a bench trial, the district court rendered judgment in favor of Jiminez, ruling that he had established a prinw facie case of race and national origin discrimination, and he had demonstrated MWC's proffered reason for the adverse action was pretextual and unworthy of credence. MWC appeals, contending that the district court effed in ruling in favor of Jiminez, and Jiminez cross-appeals, asserting that the damages are inadequate. Concluding that the factual

findings of the district court are clearly erroneous, we reverse. Given our disposition, Jiminez' cross-appeal is moot.

A.

Jiminez applied for an assistant professorship in the Department of Economics at MWC on March 4, 1989. In connection with his application, Jiminez represented that he would receive his doctorate degree (Ph.D.) in economics in June of 1989 from the University of New Mexico. A divided Economics Department extended Jiminez an offer, even though he was not the most qualified applicant; he only met MWC's minimal standards. The department was split in its decision to offer Jiminez a position since he garnered inauspicious evaluations at the University of New

Mexico. Despite this knowledge, MWC offered Jiminez the position because the college was seeking to increase the number of blacks on its faculty. To a degree, therefore, Jiminez was hired because he was black. By letter dated August 3, 1989, William Anderson (Anderson), President of MWC, notified Jiminez of MWC's offer, expressly explaining that Jiminez' appointment was "contingent upon [his] being granted [his Ph.D.] by August 16, 1989." (J.A. at 496). This contingency reflected MWC's policy applicable to Jiminez that professors seeking tenure have terminal degrees, as reflected in the faculty handbook, which provided that for consideration for promotion to assistant professor "[p]ossession of the appropriate earned terminal degree, in

most cases, the Doctorate in one's discipline (in unusual circumstances, equivalent professional achievement)" was necessary. Id. at 51 1. Thus, on extension of the offer, Jiminez was aware that obtaining his Ph.D. was necessary for promotion. In this respect, Jiminez' offer differed from that of his colleague in the Economics Department, Professor Steve Greenlaw (Greenlaw), because according to the 1982 faculty handbook in effect when Greenlaw was hired, attaining a terminal degree was not a prerequisite for advancement. Thus, Greenlaw was given tenure even though he did not obtain a terminal degree until 1986.

As a nontenured professor seeking tenure, Jiminez was subject to a six-year probationary period after which he could be awarded tenure. Consistent with MWC's

procedures, Jiminez initially was awarded a one-year contract as a newly-hired, tenure-track faculty member. Subsequent to his initial year, a tenure-track faculty member can be awarded a two-year contract, followed by a three-year contract, provided, of course, his performance satisfied MWC's standards. Following successful completion of the three-year contract, a faculty member could be considered for tenure. If a tenure-track professor is not considered for further advancement because of unsatisfactory performance, however, MWC grants him a one-year terminal contract, which expires at the termination of the academic year.

Tenure is based largely on teacher evaluations. The faculty at MWC is evaluated annually according to three

criteria: (1) teaching effectiveness; (2) service to MWC; and (3) scholarship or professional activity. Of these criteria, teaching effectiveness is paramount and is based largely on evaluations from students, the department chairman, and other faculty within the department. Scholarship or professional activity includes publication or presentation of scholarly works.

After his first semester of teaching, MWC evaluated Jiminez' performance on February 22, 1990. This evaluation was a compendium of faculty observations, student course ratings, and the annual Faculty Activities Report. The gist of this initial evaluation was that Jiminez' skills as a professor were lacking, but his personal fortitude was commendable. Specifically with respect

to the tenure criteria, this evaluation concluded: (1) Concerning teaching effectiveness, "[s]tudents were critical of the clarity and loudness of his voice, his speaking to the chalk board instead of the class, poorly worded tests, and covering material too fast." These negative conclusions were countered by the generic observation that they were "shortcomings any new teacher is bound to have, and are things easily corrected by experience." Additionally, Jiminez was "praised ... for caring about his students, holding review sessions, encouraging questions, and taking the time to make sure students understood the material." Id. at 512. (2) Regarding service to MWC, Jiminez was rated highly for his participation in college organizations. (3) Respecting

scholarship, the evaluation admonished that Jiminez' "major focus for the immediate future must be completion of his dissertation." Id. (emphasis added). Significantly, Jiminez neither protested nor contradicted the initial evaluation's conclusions.

On April 2, 1991, MWC again evaluated Jiminez' performance, this evaluation again being an amalgam of the faculty observations, student course ratings, and the annual Faculty Activities Report Focusing on the three primary criteria for tenure, this second MWC evaluation concluded: (1) With respect to teaching effectiveness, the evaluation reported that while Jiminez was dedicated, his "student evaluation scores [were] below average for both the [Economics] Department and College-wide

faculty," but expressing the hope that time would cure this failure. Id. at 514. (2) With respect to service-, Jiminez again rated highly; and (3) With respect to scholarship, the evaluation observed that Jiminez had attended various meetings. As with the initial MWC evaluation', Jiminez conspicuously took no exception to the conclusions, nor did he request consideration for a merit award.

B.

Despite a recurrent history of poor evaluations, Jiminez managed to muster some support at MWC: various students wrote letters and met with Hall on Jiminez' behall The crux of these letters was that Jiminez was a caring man and a good professor. According to Jiminez, and as found by the district court, some

of these letters suggested that Jiminez was the victim of a concerted effort of racial discrimination by some MWC students to have him terminated via poor teacher evaluations. For example, a letter from former student Laura Kasley (Kasley) recited:

It is my understanding that several students have either given Mr. Jiminez poor evaluations, or have written negative letters of complaint concerning his teaching Last semester (Fall 91), I witnessed, on evaluation day, a collaborative effort on the part of the majority of the students to give Mr. Jiminez a poor evaluation It is my opinion that the students in this class, who gave Mr. Jiminez poor evaluations, did not take the time required by the course to fully understand the material.

Since the first day of classes, Mr. Jiminez forewarned us to ask him to repeat himself if we couldn't understand his accent.... I have acclimated to his accent and find no trouble understanding him. Id. at 471-72. At trial, Kasley testified as to the allegedly collusive conduct of some students:

> Well, it was basically that they were laughing and saying, Yeah, right, this is, you know, one way, and things like this, to give him the lowest possible score, and I didn't say anything .... I am not sure why many of the students in ... economics class gave Mr. Jiminez poor evaluations, and I question if they knew what they were setting in motion by doing so; I don't think that these evaluations should be taken in

[sic] consideration. Id. at 58. Kasley testified further that her opinion of Jiminez was grounded in the fact that he helped her personally a great deal with her work and was accommodating of her schedule. Critically, Kasley testified that students expressed their displeasure with Jiminez' teach-ing abilities prior to their evaluations, which was not an uncommon occurrence.

A letter from Rachel Holland (Holland) reported that "Part of the problem lies with a small group of bigotted [sic] individuals that were in the ... class that I took last semester .... Comments like, 'Let's give him [poor] reviews' echoed around the classroom, in a situation that was not supposed to be a collective effort." Id.

at 479. Holland's testimony is equivocal in that she stated that "all" students collaborated on giving Jiminez evaluations, but later amended her testimony to reflect that the number of students was approximately ten, nor is there an ascription to the term "bigoted." Condemning these students for asking "irritating questions," Holland opined that these students "decided to thrash Professor Jiminez down" on realizing "that they might not be receiving that 'usual A."' Id. Comporting with Kasley's testimony, Holland testified that she understood Jiminez was slated for a one-year terminal contract prior to the allegedly collusive student evaluations.

Former student Cassondra Thomas (Thomas) wrote that "[a] few negative

letters state 'Hire a professor who speaks english.' This is discrimination in its truest form." Id. at 481. Nicole Dixon, a student of Jiminez', on being asked at trial if she considered that his student evaluations were racially motivated, responded that they were:

Because comments were made about the way that Professor Jiminez looked. I had other econ classes with the same students. It's a small department, so we all kind of take the same classes. And the level of respect for any professor, I don't care who it is, it just was not there for him. He come [sic] into class, and they [sic] would be utter chaos. He would give lectures, and they would try to knock him down. And you go to another professor's class, you didn't have to deal with stuff like that.

Id. at 68. Student Kristina Bielak stated that while Jiminez had "an odd sense of humor,"' she could "not help but wonder if the problems certain people ha[d] with [Jiminez] might be prejudice to some degree for I found him to be a rather competent instructor." Id. at 482. Professor Carole Corcoran on March 30, 1992, wrote to Hall stating that "subtle racism" should be taken into account in evaluating Jiminez' faculty and student evaluations. While the instructors in the Economics Department did not attend Jiminez' classes, a professor from another department attended some of Jiminez' classes and gave a positive critique.

In addition to writing letters, six students (Six Students) went to see Hall on April 28, 1992, regarding the alleged

"conspiracy" against Jiminez. In his notes on the meeting with these students, Hall wrote "Race. Accent. Mannerisms. Students here are not tolerant," id. at 49-2, and he testified that students "wanted to remind me that there was a possibility that the students had done this because of his race and his national origin, although there wasn't anything in the behavior itself that was racial," id at 335. Given that there was no evidence of racial animus and student evaluations are anonymous, Hall did not conduct an investigation into the allegation that some students had decided to target Jiminez for a terminal contract based on an invidious motive.

C.

On February 26, 1992, MWC completed Jiminez' third evaluation. Consistent

with the two prior evaluations, this evaluation recognized that Jiminez was an ineffective professor whose teaching ability failed to improve, was decidedly substandard, which was, of course, consonant with the unsatisfactory evaluations he received from students at MWC. Particularly addressing the three primary criteria for tenure, this evaluation revealed: (1) Pertaining to teaching effectiveness, "[Jiminez'j teaching has been somewhat problematic since his first semester at [MWC]." While recognizing that Jitninez was "conscientious" and "very hard working," ultimately the evaluation concluded that his teaching effectiveness was negligible: students complained that Jiminez was "disorganized, has difficulty explaining concepts, gets

confused . . . does not answer questions well, does not cover much material in a semester, has mystifying grading standards, and ultimately, loses 'control' of the class. These criticisms are also reflected in the numerical scores on [Jiminez'] course evaluations, which are perennially low." Id. at 517. This evaluation also noted that Jiminez' scores failed to meet the department and college averages. Despite his positive qualities, the evaluation concluded, with respect to his teaching effectiveness, that Jiminez' "performance has not met the standard we expect for [MWC] faculty." Id. (2) Concerning service, the evaluation noted that again Jiminez was an active participant in MWC life. (3) Regarding scholarship, the evaluation

reported that while Jiminez had attended two conventions, he failed to obtain his Ph.D., despite the fact that fulfilling this obligation was a prerequisite for tenure and his employment was contingent on this degree being awarded.

Consonant with this third evaluation and Jiminez' student evaluations in general, the three tenured members of the Economics Department, Robert Rycroft (Rycroft), Greenlaw, and Steve Stageberg, unanimously recommended that Jiminez be given a one-year terminal contract rather than considered for tenure, specifically memorializing the bases for their recommendation: (1) For five semesters, students had consistently given Jiminez poor evaluations; (2) Jiminez failed to receive his Ph.D.; (3) A self-conducted

survey of the Economics Department revealed that the primary weakness in the department was the teaching quality of specific instructors', and of the twenty responses, seventeen related specifically to Jiminez' shortcomings and a negative comment revealed by the survey concerned a course taught by Jiminez that one faculty member described as very weak and suggested that students no longer take it; (4) Jiminez had no faculty support; and (5) Jiminez experienced difficulty completing material.

(Five Students) protested to Rycroft in April of 1991 when Jiminez was substituted to teach a required economics class that Greenlaw had taught in the past. These students complained that Jiminez was a wretched instructor,

predicting that the Economics Department would suffer if Jiminez taught this course. Confirming this opinion, for five semesters, Jiminez' student evaluations were the lowest of the approximately forty tenure-track faculty members, and the one semester he was not ranked the lowest, Jiminez ranked thirty-seventh. In light of these concerns, this evaluation recommended that Jiminez be given a one-year terminal contract rather than considered for tenure.

D.

Despite three consistently unfavorable college evaluations and five semesters of unflattering student evaluations, by the spring of 1992, Jiminez' student evaluations had substantially improved, and this trend

continued into the Fall of 1992 and the spring of 1993. Thus, for the sixth, seventh, and eighth semesters, Jiminez' student evaluations improved. Jiminez and the district court attributed this improvement to the fact that the students understood that no more discriminatory collaboration would be tolerated. MWC attributed this unprecedented emendation to Jiminez' students' grades correspondingly, dramatically improving and his class enrollment being exceptionally small--eleven students in 1992 and nine in 1993-as compared with the department average of twenty-six students per class. Regardless of its source, this progress, coupled with the letters and visit by the Six Students to Hall, prompted MWC to modify its

recommendation of a terminal one-year contract; accordingly, on May 22, 1993, Hall offered Jiminez a terminal contract, but invited him to reapply for his position provided he satisfied four conditions: (1) substantial improvement in student evaluations; (2) favorable evaluations by colleagues in the Economics Department as a result of unannounced visits to his classes; (3) defense of his doctorate dissertation; and (4) presentation of a paper at an economics conference. Despite the fact that Jiminez was granted the opportunity to reapply, Hall also explained the reasons that Jiminez failed to remain on the tenuretrack: (1) five semesters of decidedly inferior student evaluations, with a significant number of students expressing their unhappiness with

Jiminez; (2) failure to defend his dissertation; Id (3) failure to produce scholarly work.

E.

Jiminez declined to reapply, opting instead to institute suit against MWC, alleging that he was discriminated against because of his race and national origin. At the close of his case-in-chief, MWC and Hall moved unsuccessfully for judgment as a matter of law. The district court concluded that Jiminez had established a prima facie case of race and national origin discrimination, that MWC had rebutted it, but Jiminez had demonstrated that MWC's reasons for not renewing his contract were both pretextual and unworthy of credence. The basis for the district court's conclusion that Jiminez rebutted MWC's

proffered reasons for issuing him a terminal contract was the fact that Greenlaw was given tenure even though he did not receive his doctorate degree until his fourth year at MWC, student evaluations were "tainted by collusion and racial and national origin animus," and thus MWC should have ignored them because of this taint, as well as conducted an "in-depth investigation to determine the extent of the taint." Id. at 552. Rather than ignore the tainted evaluations or conduct an investigation, the district court found that MWC merely solicited the opinion of the Five Students that had complained to Rycroft that Jiminez was incompetent. According to the district court, therefore, MWC knowingly relied on tainted information in issuing Jiminez a terminal contract.

Finding that Jiminez ultimately carried his burden of proving that he was the victim of invidious discrimination "because he ha[d] proven both that [MWC's] 'proffered explanation is unworthy of credence,' and that the reasons given for the adverse action were merely a pretext for discrimination," the district court entered judgment in his favor. Id. at 552. After making this finding, the district court concluded that once MWC offered Jiminez the position, even though he was not the most qualified candidate, MWC "made a committment to protect [him] from racial and national origin animus." Id. at 549.

On appeal, MWC contends that Jiminez was not the victim of invidious discrimination, but was issued a

terminal contract because he was an incompetent professor, citing three reasons: (1) he consistently received poor student evaluations; (2) he produced no scholarly work; and (3) he failed to obtain his Ph.D. In advancing this contention, MWC maintains that the district court's factual findings are clearly erroneous, and, given this erroneous predicate, the legal conclusions on which the facts are premised are reversibly flawed.

Jiminez cross-appeals, asserting that the $15,000 in compensatory damages was inadequate.

II.

A.

We commence with the premise that while Title VH is available to aggrieved professors, we review professorial

employment decisions with great trepidation. See Fields v. Clark Univ., 966 F.2d 49, 54 (I st Cir. 1992), cert. denied, 113 S. Ct. 976 (1993); Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 975-76 (8th Cir. 1991); Zahorik v. Cornell Univ., 729 F.2d 85, 92-93 (2d Cir. 1984); Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980). We must be ever vigilant in observing that we do not "sit as a 'super personnel council' to review tenure decisions," Brousard-Norcross, 935 F.2d at 976, always cognizant of the fact that professorial appointments necessarily involve "subjective and scholarly judgments," with which we have been reluctant to interfere, Smith v. University of North Carolina, 632 F.2d 316, 345-47 (4th Cir.

1980). Aptly articulating this rubric, the Third Circuit cogently cautioned:

> [C]ourts must be vigilant not to intrude into [tenure] determination[s], and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professional, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Kunda, 621 F.2d at 548. The federal courts have adhered consistently to the

principle that they operate with reticence and restraint regarding tenure-type decisions. See, e.g., Bina v. Providence College, 39 F.3d 21, 26 (ist Cir. 1994), cert. denied, 115 S. Ct. 1406 (1995); Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980). Our review is narrow, being limited to determining "whether the appointment or promotion was denied because of a discriminatory reason." Smith, 632 F.2d at 346. In other employment contexts, we have explained that Title VII is not a vehicle for substituting the judgment of a court for that of the employer. See EEOC v. Clay Printing Co., 955 F.2d 936, 946 (4th Cir. 1992) (noting that the federal courts should "not..... direct the business practices of any company"). Title VU, therefore, is not

a medium through which the judiciary may impose professorial employment decisions on academic institutions.

B.

1. Launched from this precept, we now examine the procedural posture of this case and our standard of review. The district court concluded that Jiminez established a prima facie case of race and national origin discrimination and thus proceeded to the ultimate issue of whether an unlawful animus or the proffered nondiscriminatory reason for Jiminez' failure to receive tenure constituted the genuine reason for the adverse action. See McDonnell Douglas Corp. v. Green, 411 U.S. 7921) 802 (1973). Although we express grave doubts with respect to whether Jiminez established a

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Mary's, the fact-finder's rejection of the legitimate, nondiscriminatory reason proffered by the defendant, coupled with the elements of the prima facie case, may permit the fact-finder to infer the ultimate fact of invidious discrimination with no additional proof of discrimination; however, the plaintiff is not automatically entitled to judgment because the fact-finder may determine that the defendant's challenged conduct is pretextual, but does not constitute invidious discrimination. Accordingly, rejection of the defendant's proffered reason-standing alone--Aoes not compel the ultimate conclusion that the defendant unlawfully discriminated against the plaintiff, thus creating liability under Title VH, but rather this factor may

enter the calculus for determining this conclusion. With respect to proving whether the plaintiff has been the victim of invidious discrimination under the McDonnell Douglas paradigm, we have opined that if-the employee was hired and fired by the same person within a relatively short time span . . . this fact creates a strong inference that the employer's stated reason for acting against the employee is not pretextual.... In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing. Proud v,. Stone, 945 F.2d 796, 798 (4th Cir. 1991). Here, the district court misapplied St. Mary's because it held that Jiminez proved his ultimate burden of demonstrating that he was the

victim of invidious discrimination because he proved that MWC's proffered reason for issuing the terminal contract was unworthy of credence and a pretext for discrimination. Although the district court misapplied the proper legal standard, our examination of the record compels us to conclude that Jiminez failed to satisfy his ultimate burden of proving he was the victim of invidious discrimination.

2. MWC challenges the district court's conclusion that it issued a terminal contract to Jiminez because of invidious discrimination based on race and national origin, a conclusion grounded in facts. Resolution of this challenge entails an examination of the manner in which facts were adduced by the district court. According to MWC,

the district court's factual findings are clearly erroneous. In reviewing factual findings, our scope of review is particularly circumscribed, being limited to determining whether the facts as found by the district court are clearly erroneous. See Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985); Fed. R. Civ. P. 52(a). Admonishing appellate courts that a purpose of an appeal is not to exercise plenary review of factual findings or substitute their version of the facts for that of the district court, see Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), the Court has explained that 11[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the

court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently," Anderson, 470 U.S. at 573-74. Facts are conclusive on appeal, therefore, unless they are plainly wrong. Being removed in time and place from the trial, not enjoying the advantage of five testimony, or assessing the deportment and credibility of witnesses, reviewing courts tread gingerly in reviewing facts. Jiminez, therefore, is well-armed with the sword and buckler of Rule 52(a) in defending the district court's judgment to the extent MWC challenges the factual findings.

Our reservation, however, does not compel the conclusion that factual findings are so sacrosanct as to evade review. See, e.g., Wileman v. Frank, 979 F.2d 30 (4th Cir. 1992) (concluding that factual findings by the district court in a Title VH suit were clearly erroneous and accordingly reversing); Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988) (same); Miller v. Mercy Hosp., Inc., 720 F.2d 356 (4th Cir. 1983) (same), cert. denied, 470 U.S. 1083 (1985). As the Anderson Court explained, the district court may not "insulate his fmdings from review" by casting them as being grounded on credibility determinations. Anderson, 470 U.S. at 575. We reverse a factual finding as being clearly erroneous if, "although there is evidence to support

it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). In concluding that the district court has made a mistake, we tend to focus on four avenues in which the district court may go awry in arriving at its factual findings: (1) the district court labored under an improper view or misconception of the appropriate legal standard; (2) the district court's factual determinations are not supported by substantial evidence; (3) the district court disregarded substantial evidence that would militate a conclusion contrary to that reached; and (4) the district court's conclusion is contrary to the clear weight of the

evidence considered in light of the entire record. See Miller, 720 F.2d at 361. The result of this focus is to channel our review "upon factfinding processes rather than directly upon fact-fmding results," id., which, of course, comports with the Zenith Radio Corp.-Anderson admonition that an appeal not transform into a plenary trial by which facts are adduced in the first instance. Accordingly, MWC may assault the citadel provided by Rule 52(a) by demonstrating pitfalls in the avenue by which the district court arrived at its factual findings. While Miller categorized the various modes in which a district court may clearly err in adducing facts, we do not intimate that these are the only modes that may give rise to clear error. These observations

being made, we proceed to analyze the district court's factual findings, focusing on the issue of whether Jiminez proved that the reason for his receipt of a terminal contract was a pretext for invidious discrimination and was the genuine reason for MWC's decision to issue a one-year terminal contract.

MWC issued Jiminez a terminal contract based on three reasons: (1) consistently poor student evaluations; (2) failure to obtain his Ph.D. in a timely manner; and (3) failure to produce scholarly work.'

We address these reasons and the facts on which they are premised seriatim.

A.

We first examine the district court's conclusions regarding the student evaluations. First, the district court

disregarded all save the last three semesters of Jiminez' student evaluations, concluding that the first five semesters' evaluations were tainted. Second, the district court found that MWC knew of this taint.

1. The district court concluded that the more favorable student evaluations Jiminez received during his sixth, seventh, and eighth semesters at MWC constituted proof that his student evaluations for the first five semesters were tainted by the collusive effort of some white students. According to the district court, the student evaluations for the sixth, seventh, and eighth semesters are exclusively accurate because various white students who had given Jiminez poor evaluations real-

'At oral argument, MWC represented that

even disregarding the student evaluations, Jiminez would not have been granted tenure because: (1) he had no departmental support; (2) he failed to obtain his Ph.D., (3) he had a negative self-evaluation by the economics department; and (4) he failed to cover course material. We find that the latter three reasons are subsumed by the remaining two reasons cited in the text of the opinion.

by spring of 1992 that their collusion in evaluating Jiminez would not be tolerated. The district court, therefore, disregarded completely student evaluations for the fust five semesters Jiminez was at MWC, i.e., all of the evaluations reflecting that Jiminez was a dismal instructor. We conclude that the first five semesters'

student evaluations were neither tainted, nor should they have been disregarded.

The record does not support the district court's conclusion that the first five semesters' student evaluations were tainted. One, the "evidence" that the poor student evaluations were tainted by a "conspiracy" motivated by invidious discrimination consists of the letters and testimony from some students stating that there was a collaborative effort against Jiminez by some white students to have him removed from tenure-track status. These letters and testimony are nothing but rank speculation and are far too insubstantial to give rise to the inference that for five semesters Jiminez incurred poor student

evaluations because of collusive discrimination based on an unlawful animus by some white students. This "evidence" proves nothing, but merely alludes to the assertion that some, unnamed white students gave Jiminez poor evaluations. Two, many of these letters are undated and unsigned, speak in the vaguest of generalities, and are nothing more than post hoc rationalizations for what their authors desire them to be.

Moreover, an examination of these letters and testimony does not support a finding of invidious discrimination. For instance, Thomas' of the district court found that there was an atmosphere of racial tension at MWC. This finding was based largely on the fact that in the 1991-92 academic year, three black students received an

anonymous death threat, but there was no evidence that these threats were from persons at the college, and in 1986-87, MWC commissioned a report on affirmative action, which recommended that "sensitivity training" be implemented at MWC, which action was taken prior to Jiminez'joining the faculty. The lisensitivity training" was implemented primarily because another black faculty member had received negative evaluations allegedly because of her race. While there may have been some racial tension at MWC, there was not a pervasive atmosphere of discrimination against blacks. For example, President Anderson raised the black student population from three to twelve percent; Jiminez was hired because he was black; MWC sponsored a forum about the death

threat; and MWC, which was over-whelmingly white, subjected itself to "sensitivity training."

letter reported that the statement "Hire a professor who speaks English" was "the truest form of discrimination." (J.A. at 481). We find this bald assertion absurd-requiring that a professor speak the native tongue in order to convey his ideas is not any form of discrimination, invidious or otherwise. This sentence merely expresses the frustration of a student stymied by a professor not conversant in the language of his students. This explanation comports with Kasley's testimony that Jiminez himself recognized that he was difficult to understand. We agree with the First Circuit that "references to audience difficulty in understanding [a Title VII

professor seeking tenure] may reasonably be interpreted as expressing a concern about his ability to communicate to students rather than discriminatory animus based on ethnicity or accent." Bina,, 39 F.3d at 26. Likewise, Holland's letter suggested that because some white students wanted to give Jiminez inferior evaluations, this was motivated by invidious discrimination, but there is nothing unlawfully discriminatory about this ascription of conduct. The letter and testimony by Kasley stating that there was a collective effort to give Jiminez poor evaluations did not attribute any alleged conspiracy to any form of invidious discrimination. Rather,, Kasley attributed the poor student evaluations to students who "did not

take the time required ... to fully understand the material." (J.A. at 472) (emphasis added). Further bolstering this conclusion, Kasley testified that "I am not sure why many of the students in ... economics class gave Mr. Jiminez poor evaluations, ..." Id. (emphasis added). Ultimately, Kasley opined that some students did not do well because they did not work hard enough. Harmonizing with this testimony,, former part-time student Kathryn Meyers stated that students critical of Jiminez were likely "those that either talk to their friends throughout class or those who simply choose not to attend the majority of classes." Id. at 468. Bielak's letter is equally unavailing because it "wonder[ed]" whether there "might" have been prejudice against Jiminez, but it

ascribed any possible prejudice to no invidious motive. Id. at 482. Apart from being mere speculation, these observations do not demonstrate a conspiracy or collusive effort against Jiminez based on any form of invidious discrimination. Similarly, Brown's testimony does not establish a conspiracy motivated by an improper racial animus. According to Brown, Jiminez could not control his class, and this lack of control led to "utter chaos." As with the other evidence of the "conspiracy," Brown's testimony reveals no invidious discrimination, but at most that Jiminez lacked the capacity to exert control. These students fail to perceive that the majority of other students may have-and apparently did-fmd Jiminez to be an abominable instructor.

Succinctly put, this evidence is too insubstantial to establish a "conspiracy" to remove Jiminez from tenure-track status, the impetus of which was invidious discrimination. Rather, one guiding force behind Jiminez' being issued a terminal contract was that he was considered an unsuitable instructor by MWC students as reflected in five semesters of execrable student evaluations. In subscribing to this "conspiracy" theory, the district court clearly effed.

The compelled conclusion, therefore, is that the district court erred in finding the first five semesters' student evaluations were tainted, and thus properly disregarded, because there was not substantial evidence to support the finding that for

five semesters the student evaluations were tainted. The record conclusively establishes that this evidence was grossly insubstantial to permit the conclusion that there was a conspiracy to effect Jiminez' employment status based on invidious discrimination. Moreover, the record does not establish that all five semesters' worth of student evaluations should be disregarded. Even though the district court found that all five semesters' student evaluations were tainted, it made no specific fmdings with respect to each semester, but merely engaged in a wholesale dismissal of all evaluations for Jiminez' first five semesters at MWC. We are disturbed by this dismissal because many of the letters recounting the collusive effort are undated, and

the letters that are dated were from April, May, and December of 1992, and do not list specific dates, other than 1991, that the alleged collaboration occurred. See Bina, 39 F.3d at 26. Having concluded that there was insubstantial evidence to support a conspiracy theory based on tainted student evaluations, the district court erred in failing to consider the student evaluations for the first five semesters of Jiminez' career at MWC because, as the Eighth Circuit succinctly explained, "student reaction is a legitimate, nondiscriminatory factor on which to evaluate tenure candidates." Brousard-Norcross, 935 F.2d at 976; see also Fields, 966 F.2d at 53-54 (using student evaluations in reviewing denial-of-tenure decision). The student

evaluations that were disregarded disclosed that Jiminez was an inferior instructor, disorganized, confused, experienced difficulty in explaining concepts and answering questions, and these student evaluations coincided with the three evaluations conducted by MWC. Additionally, the district court appeared to conclude that MWC issued Jiminez a terminal contract based only on the fact that it gave credence to the Five Students who complained to Rycroft, but Jiminez' being issued a terminal contract was based on a plethora of information, namely the student and N4WC evaluations.

Likewise, the district court disregarded conflicting testimony. For instance, MWC elicited the testimony of Chip Walker, a former student of

Jiminez', who stated that Jiminez was ineffective and generally a poor professor. In excluding such testimony from its calculus in determining whether Jiminez was the victim of invidious discrimination, the district court clearly erred. See Wileman, 979 F.2d at 35 n.6; Hayes v. Invesco, Inc., 907 F.2d 853, 858 (8th Cir. 1990) (reversing the district court's factual finding with respect to pretext in a discrimination suit because the district court "failed to consider . . . important evidence").

In crediting only the latter three semesters' evaluations, the district court did not consider the fact that during this time Jiminez awarded higher grades or that his class size was substantially smaller than average. The district court disregarded this evidence

because it "was not considered or even available at the time the terminal contract decision was made." (J.A. at 548-49). This finding, however, is erroneous for at least two reasons: One, Hall knew of the poor student evaluations; indeed, in his May 22, 1992 letter informing Jiminez that he was being given a terminal contract, Hall mentioned the five semesters of negative student evaluations, and Hall was privy to the three MWC evaluations of Jiminez. Two, this view of the evaluations demonstrates MWC's position that Jiminez was an ineffective professor and his latter evaluations were artificially inflated because of the higher grades he awarded and his shrinking class size, as demonstrated by the May 22, 1992 letter, which observed the "unusual and dramatic

'turnaround"' in Jiminez' student evaluations. (J.A. at 523). Thus, the district court made a factual finding "without properly taking into account substantial evidence to the contrary" in reaching its decision. See Miller, 720 F.2d at 361 (factual findings of the district court in a Title VII action reversed as clearly erroneous because they were not supported by substantial evidence or were made without considering substantial contrary evidence).

Also, the district court found that only these latter evaluations were accurate because white students "realized that such collusion would not be tolerated." (J.A. at 546). There is, however, no evidence that this intolerance was conveyed or published so

that white students were supposedly apprised of it. Indeed, Brown stated that the allegedly collusive student evaluations were made subsequent to the decision to issue Jiminez a one-year terminal contract. We are, therefore, "left with a definite and firm conviction that a mistake has been committed" because the district court's findings with respect to the first five semesters' student evaluations were neither supported by the record, nor was contrary substantial evidence considered in adducing the facts.

2. We now turn our attention to the district court's fmding that MWC knew the student evaluations were tainted, yet failed to take any corrective measures. While the district court found that Hall "accepted as true"

what the Six Students told him respecting Jiminez' evaluations, id. at 544, this characterization of Hall's testimony is clearly erroneous: Hall did not testify that the poor student evaluations were tainted by discrimination, but merely that the Six Students "wanted to remind me that there was a possibility that the students had done this because of his race and his national origin, although the behavior they described said nothing about race--there wasn't anything in the behavior itself that was racial." Id. at 335 (emphasis added). We are persuaded, therefore, that the testimony does not support the finding that Hall improperly relied on tainted information in deciding to issue Jiminez a terminal contract. See Miller, 720

F.2d at 364-68 (reversing a judgment in favor of a Title VII plaintiff based, inter alia, on the district court's misunderstanding testimony); see also Briney v. Sears, Roebuck & Co., 782 F.2d 585, 588-89 (6th Cir. 1986) (reversing judgment as a matter of law on a negligent design claim because the district court misconstrued testimony). Most revealingly, there is no evidence that any alleged "conspiracy" influenced MWC's decision to ten-ninate Jiminez. There is, therefore, no nexus between the challenged conduct and the adverse action. See Clay Printing Co., 955 F.2d at 942-43. Contrary to the district court's factual finding, therefore, MWC did not knowingly, improperly use tainted evaluations in reaching its decision to issue Jiminez a ten-ninal

contract.

B.

With respect to Jiminez' failure to obtain his Ph.D. and produce scholarly work, the district court gave short shrift to these reasons, merely reciting that they were "pretextual as well" in light of Greenlaw's career at MWC. Accordingly, the district court ruled that Jiminez carried his ultimate burden of demonstrating that he was the victim of intentional, invidious race and national origin discrimination "because he has proven both that [MWC's] 'proffered explanation is unworthy of credence,' and that the reasons given were merely a pretext for discrimination." (J.A. at 552). As stated, we conclude that the district court incorrectly applied St. Mary's.

We conclude further that the factual premise upon which these legal conclusions were rendered is clearly erroneous.

Jiminez failed to obtain his Ph.D. by August 16, 1989, and the August 3, 1989 letter informing Jiminez of the offer by MWC expressly conditioned his employment success at MWC on his obtaining a Ph.D. This failure rendered Jiminez unqualified because tenuretrack professors were required to obtain a terminal degree. While Jiminez submitted a letter from the University of New Mexico dated August 21, 1992, stating that he had successfully defended his dissertation, the letter also explained that Jiminez was "making final editorial changes for the submission of the complete

dissertation." Id. at 459. At oral argument, the parties represented that Jiminez had failed to obtain his Ph.D. by the date of trial and failed to answer our repeated inquiries as to whether Jiminez had yet been awarded his Ph.D. We, therefore, cannot determine whether Jiminez achieved his terminal degree. Regardless of when, if ever, he obtained his Ph.D., he failed to do so within the prescribed time, and his employment was conditioned expressly on his receiving his Ph.D. by August 16, 1989.

The district court, however, concluded that Jiminez' failure to obtain his Ph.D. was mere pretext for discrimination because Greenlaw was at MWC for four years before obtaining a Ph.D., yet was not terminated. This

fmding is flawed because when Greenlaw was hired in 1982, having a Ph.D. was not a requirement for promotion, whereas when Jiminez was hired, it was. Comparing Jiminez with Greenlaw is thus not only inapt, see Bennun v. Rutgers State Univ., 941 F.2d 154, 178 (3d Cir. 199 1), cert. denied, 502 U.S. 1066 (1992), but also disregards the predicate and procedure under which each was hired, see Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 13741) 1384 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979). The district court erred,, therefore,, in comparing the timing and conditions of Greenlaw's hire with that of Jiminez'. Unlike the district court, we cannot "infer discrimination from a comparison among candidates" for a professorial appointment because "[a]

university's prerogative 'to determine for itself on academic grounds who may teach' is an important part of our long tradition of academic freedom." Lieberman, 630 F.2d at 67 (quoting Sweeny v. New Hampshire, 354 U.S. 234, 263 (1957) (FTankfurter,, J., concurring). A defendant's requirements with respect to a Title VII plaintiff's academic degree does not constitute invidious discrimination. See, e.g., Wileman,, 979 F.2d at 37 (holding that an employer's preferring an applicant who obtained a masters degree, as opposed to Title VH plaintiff "who had thirty-seven credits in business administration classes taken over a ten[-]year period" was not evidence of pretext for discrimination and the district court erred in finding

otherwise); Wrenn v. Gould, 808 F.2d 4939 502 (6th Cir. 1987) (explaining that in a Title VU suit an employer may prefer, but not require, that an applicant have a particular degree and such a requirement is not improper); Hernandez-Cruz v. Fordham Univ.,, 521 F. Supp. 1059,1071 (S.D.N.Y. 1981) (holding that an unsuccessful tenure applicant asserting a Title VU claim based on race and national origin was not awarded tenure for failure to secure a Ph.D., not because of invidious discrimination motivated by improper animus) (Lombard, Circuit Judge). ParentheticaUy, we observe that, unlike Jiminez, Greenlaw had consistently superior student evaluations, as well as the support of the Economics Department. The crucial issue in a Title VIII action is an

unlawfully discriminatory motive for a defendant's conduct, not the wisdom or folly of its business judgment. See Furnco Constr. Corp. v. Waters,, 438 U.S. 567, 577 (1978). To this end, the district court erred in concluding that despite the fact Jiminez was not the best qualified candidate,, on hiring him MWC assumed particular or additional burdens "to protect Jiminez from racial and national origin animus." (J.A. at 549). MWC's duty was only to refrain from taking adverse employment action against him because of invidious racial discrimination, and MWC's obligation did not extend to protecting Jiminez against any alleged racial and national origin animus by others in the employment community, nor to excusing derelictions in job performance because

the animus of others may have contributed to it.

The district court's conclusion is erroneous because it failed to consider other substantial, contrary evidence. For instance, Cynthia Grund, a white professor hired in 1990, was terminated after one year exclusively because she failed to complete her Ph.D. Additionally, Rick Hydell, a former faculty member at MWC who is white, was given a terminal contract in the same year Jiminez was hired and MWC implies in its brief (although the record is unclear) that his termination was for failure to obtain his doctorate degree, even though Hydell's student evaluations were superior to those of Jiminez. Clear error was the result of disregarding this evidence. See Soria

v. Ozinga Bros., Inc., 704 F.2d 990, 999 (7th Cir. 1983) (stating that the district court committed clear error in disregarding evidence of discrimination in a Title VII suit, but that the error in that instance was harmless). Equally, the district court disregarded the fact that other black professors prospered at MWC. Taddessa Adera, a native Ethiopian, enjoyed superior student evaluations, and he passed his third-year review at MWC. Likewise, Professor George King, who was also black and Chairman of the Physics Department, received stellar student evaluations. These crucial facts were not considered by the district court in rendering its judgment and hence did not enter the calculus in resolving this case. 'The district court was not at

liberty to disregard this evidence. See Ezold v. Wolf, Block, Schorr and Solis-Cohen-,- 983 F.2d 509, 538 (3d Cir. 1992) (stating that "when the evidence sheds light on whether the employer treated similarly situated males and females alike, it should not be ignored"), cert. denied, 114 S. CL 88 (1993).

C.

Jiminez produced no scholarly work. While he was somewhat excused from this requirement while working on his Ph.D., he did not complete his Ph.D. in the prescribed time, nor by the time he was given a terminal contract; hence, he cannot take refuge in this safe harbor. Jiminez himself testified that during his entire stint at the college, he never published a single work in a peer-

review publication. We note that Jiminez' failure to produce scholarly publications presents a legitimate rationale for issuing a terminal contract. See King v. Board of Regents of Univ. of Wis. Sys., 898 F.2d 533, 540 (7th Cir. 1990) (explaining that a Title VII plaintiff "was not qualified for tenure renewal," inter alia, because she failed to produce "scholarly publications"); Lieberman, 630 F.2d at 66 (noting that scholarship is an integral factor in assessing tenure-type decisions). As with the other evidence, the district court disregarded the fact that Jiminez had defaulted on this obligation and, in so doing, clearly erred.

IV.

We are left with the definite

conviction that the factual fmdings of the district court are clearly erroneous. Predicated on such a faulty premise, the district court's legal conclusions cannot withstand scrutiny. Here, the district court ignored substantial evidence or failed to evaluate substantial-contrary evidence in making its findings of fact. We hold that Jiminez failed to satisfy the obligations imposed on him by St. Mary's in that he failed to prove that he was a victim of invidi- ous discrimination. The judgment of the district court, therefore, is reversed.

REVERSED

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

ANTHONY E. JIMINEZ

Plaintiff,

V.

MARY WASHINGTON COLLEGE and

PHILIP HALL,

Defendants.

C.A. No. 93-459

INTERIM ORDER

This matter is before the Court for resolution following a bench trial conducted on February 14-15, 1994. For the reasons stated-in the accompanying Findings of Fact and Conclusions of Law, the Court renders judgment for plaintiff and against defendant Mary Washington College with respect to plaintiff's claims pursuant to Title VII. of the

Civil Rights Act of 1964, as amended, 42 U.S.C. SS 2000e to 2000e-17, and 42 U.S.C 5 1981, and for Jiminez and against defendant Hall with respect to plaintiff's claim under 42 U.S.C. S 1983.. Because the Court bifurcated the liability and relief phases of,the trial, the Court directs the parties to schedule a hearing on the relief attorney's fees within on the relief phase and any corresponding request for attorney's fees within 10 days from the date of entry of this Interim Order. If such a hearing is not scheduled, the Court will consider plaintiff's request for relief to be abandoned.

It is so ORDERED.

Let the Clerk send a copy of these Findings of Fact and Conclusions of Law along with the accompanying order to all

counsel of record.

DATE

April 15 1994

16. The purposeful discrimination element of a claim alleging racial and/or national origin discrimination in employment under 42 U.S.C. S 1983 is analyzed in the same manner as a Title VII claim. Hicks v. St. Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992), revld on other grounds, St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). Therefore, the McDonnell framework set out above is applicable to Jiminez' S 1983 claim against Hall. 113 S. Ct. at 2746 n.1.

17. Because Hall was intimately involved with the decision to give Jiminez a terminal contract and his actions were causally connected to Jiminez receiving a terminal contract, the analysis set out in Conclusions of Law qq 3-11 apply with equal force to

the S 1983 claim. Hicks, 970 F.2d at 491.

18. Therefore, the Court finds for Jiminez and against Hall on Jiminez, S 1983 claim.

C. Plaintiff's Relief

19. At the commencement of the trial, the Court agreed to consider the relief aspect of this case separate from the liability phase. Some evidence related to damages was introduced at trial, but an additional hearing will bg necessary so that the Court can determine what relief is appropriate for the plaintiff based on the Court's conclusions with respect to liability.

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decision. Having found that the student evaluation rationale was pretextual, the Court determines that the other reasons given by MWC for its

action, Jiminez, failure to defend his dissertation and to produce scholarly work, were pretextual as well. These reasons simply cannot withstand scrutiny in light of the fact that Greenlaw, viewed on the same time scale, had the same shortcomings and was still kept on the tenure track and eventually granted tenure. (See Findings %% 12-15). The rationale put forth by MWC was a pretext for discrimination.

12. Therefore,, the Court finds for Jiminez and against MWC on Jiminez' Title VII and S 1981 claims.

B. 9 1983 Claim Against Hall

13. 42 U.S.C. S 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen
> f the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

14. An action under 5 1983 has two essential elements: (i) the defendant must have been "acting under color of state law"; and (ii) the defendant's conduct must have "deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986).

15. In this case it has not been challenged, and the Court finds, that Hall was acting under color of state law.

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to award a three-year contract to Jiminez. As set out in Hall's letter of May 22, 1992 to Jiminez, (see Finding 'ff 33), MWC's reasons for giving Jiminez a terminal contract were: (1) that Jiminez' student evaluations over five semesters were poor; (2) that he had not successfully defended his dissertation; and (3) that he had not produced scholarly works.

11. However, Jiminez has successfully carried his ultimate burden of persuading the Court that he has been the victim of intentional discrimination on the basis of his race and national origin because he has proven both that

defendants, "proffered explanation is unworthy of credence," Burdine, 450 U.S. at 256, and that the reasons given were merely a pretext for discrimination. See St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2752 (1993). As the Court found in Finding 1 37, after being made aware that Jiminez, student evaluations had been tainted by collusion and racial and national origin animus, the Department of Economics, Hall and Anderson either should have ignored Jiminez' student evaluations in reaching their respective decisions about his contract, or should have conducted an in-depth investigation to determine the extent of the taint. They did neither. Rather, they intentionally gave credence to the questionable evaluations and to the selective examination of five white

students by Rycroft in assessing Jiminez, teaching effectiveness. They then relied heavily upon this assessment in reaching their conclusion that Jiminez should be given a terminal contract, thereby knowingly using information tainted by discrimination to reach their

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rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

8. The court in Kumar v. Board of

Trustees, Universit

e cour in Kumar v. Board of Trustees, University of Massachusetts, 774 F.2d 1 (1st Cir. 1985), adapted this prima facie test to apply in the context of a tenure decision. While the case before this Court does not specifically involve a tenure decision, the language used by the Ku.mar court is helpful. The Kumar court altered the second prong of the McDonnell test by requiring the plaintiff to show that he was a candidate for tenure and was qualified under the school's standards, practices, and customs. The fourth prong was altered such that the plaintiff must show that tenure positions were open at the time of his rejection. Id. at 7.

9. Jiminez has satisfied the prima facie test in this case:

(1) he is a member of both a racial and a national origin minority;

(2) he was a candidate for a three-year contract which is the final phase prior to the tenure decision at MWC and, as the Court found in Findings 'off 37-38, he was qualified to receive the contract under MWC's standards, practices, and customs; (3) despite his qualifications, he did not receive the three-year contract but instead was given a one-year terminal contract; and (4) soon after Jiminez was given the terminal contract, the Department of Economics began actively seeking to fill the tenure-track position that Jiminez had occupied.

10. MWC has rebutted plaintiff's prima facie case by putting forth legitimate, non-discriminatory reasons for their decision not 17

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256. To do this, the plaintiff must prove by a preponderance of the evidence that the reason given is not the real reason, but is merely a pretext for discriminatory actions. The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.,, Id.

6. 42 U.S.C. S 1981 provides in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modif ication, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment..... under color of State law.

The burden of proof arrangement for actions brought pursuant to 42 U.S.C. S 1981 is identical to that used in disparate treatment cases under Title VII. Patterson v. clean Credit Union, 491 U.S. 164, 186 (1989), revld on other

grounds, Civil Rights Act of 1991, P.L. 102-166; see also Williams v. Cerberonics, Inc.,, 871 F.2d 452, 457-58 4th Cir. 1989).

7. In McDonnell, the U.S. Supreme Court noted that a

> plaintiff may meet the prima facie case burden by showing
>
> (i) that he belongs to a racial (or national origin] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was

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I -41 . , I..) i considered or even available at the time the terminal contract decision was made.

40. The Court also finds that once MWC made the decision to hire Jiminez, despite the fact that he was, according to Greenlaw and Rycroft, not the best qualified candidate, it made a commitment to protect Jiminez from racial and national origin animus.

II. CONCLUSIONS OF LAW

A. Title VII and 5 1981 Claims Acrainst MWC

1. Jiminez is a member of a distinct subgroup protected by Title VII against racial and national origin discrimination.

2. Defendant MWC is an agency employing more than 15 persons within the meaning of Title VII, 42 U.S.C. SS 2000e to 2000e-17.

3. In Title VII cases, the burden of proof is allocated

according

according to the scheme set out in McDonnell Doucflas Corp. v. Green, 411 U.S. 792 (1973). The

plaintiff in a disparate treatment

. case must

case must initially prove a prima facie case' of racial and/or national origin discrimination.

4. Proof of a prima facie case then gives rise to an

inf erence of discrimination.

Co., 882 F.2d 908 (4th Cir.

an erence of discrimination. Mallory v. Booth Refrigeration Sui)plv Co., 882 F.2d 908 (4th Cir. 19810). To rebut this inference, the employer must

articulate a legitimate, nondiscriminatory reason for the adverse employment action. Texas Dept. of Community Af fairs v. Burdine, 450 U.S. 248, 253 (1981).

5. Once the defendant articulates a legitimate reason, the plaintiff must carry his ultimate burden of persuading the Court that he has been the victim of intentional discrimination. Id. at

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collusion and racial and national origin animus were made known to Hall and Anderson, Jiminez had been treated in a non-discriminatory fashion by the staff and faculty at MWC. However, once

they became aware that the student evaluations were tainted, and knowing that MWC was a predominantly white college with a history of racial tension, (see Ilff 9-11), the Department of Economics, Hall and Anderson either should have ignored Jiminez' student evaluations in reaching their respective decisions about his contract, or should have conducted an in-depth investigation to determine the extent of the taint. They did neither, but rather gave credence both to the evaluations and the selective examination of five white students by Rycroft in assessing Jiminez, teaching effectiveness. In giving Jiminez the right to reapply for the tenure track position, the department, Hall, and Anderson merely "glossed over" the fact that Jiminez,

evaluations were tainted and, without an investigation, unreliable.

38. Because no investigation was conducted with respect to Jiminez' student evaluations for his first five semesters, those evaluations should have been ignored. The Court finds that it must ignore those evaluations in the context of this suit and therefore finds that Jiminez was qualified to receive the subsequent threeyear contract.

39. Defendants presented a statistical analysis at trial of the student enrollment in Jiminez, classes and of the grades awarded by Jiminez. (Test. of Hall; Defs.1 Exs. 23, 24). The Court finds that there is no evidence showing that these data were

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that he would have to fulfill certain conditions in order to be considered a viable candidate. These conditions were:

> 1. Substantial improvement of the student evaluations of [Jiminezl] classes, and,

2. Favorable evaluations by (the] department as a result of their [sic] unannounced visits to [the] classes, and,

3. Successfully defend[] [his] dissertation by August 31, 1992, and,

4. [] [Tlake[] appropriate steps to be included on the program to present a paper at a regional economics conference.

34 - On June 10, 1992, Anderson wrote a letter to Jiminez informing him

that Anderson concurred in Hall's recommendation and had forwarded that recommendation to the Board of Visitors. (Pl. Is Ex. 19) .

35. On June 17, 1992, Jiminez received confirmation from Anderson that the Board of Visitors voted to give Jiminez a one year terminal contract for 1992-93. (Pl.'s Ex. 20).

36. In December 1992, Jiminez asked Hall whether Hall thought Jiminez should reapply for the tenure track position. Hall mentioned that he did not think the department would change its decision. (Test. of Hall). Jimtnez did not reapply.

37. Based on the standards utilized by MWC for promotion and tenure decisions, (see 11 7), and a comparison with Greenlaw, a tenured faculty member in the Department of Economics, Jiminez was

qualif ied to receive the three-year contract which

receive e t ree-year

contract which would have carried him through his tenure-decision year except for the results of his student evaluations. Prior to the time that assertions of

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further proof that the earlier student evaluations were "skewed" by collusion; on these later evaluations, the students realized that such collusion would not be tolerated.

33. On May 22, 1992, Hall sent Jiminez a letter advising him of the position he was going to take with respect to the Department of Economics recommendation to give Jiminez a terminal contract for academic year

1992-93. (Defs.1 Ex. 12; Pl.'s Ex. 17). Hall noted that he and the members of the department were getting "two very different messages about [Jiminezl] teaching effectiveness" and he was "uncertain and therefore uncomfortable" about the decision to make. On the one hand, noted Hall, Jiminez, student evaluations over five semesters had been "decidedly sub-par" and a "significant number of students" had registered their unhappiness. Hall commented that, on the other hand, Jiminez, student evaluations for the Spring 1992 semester were "at or above College averages" and comments and visits from students were "heavily in (Jiminez'] favor." Hall added, however, that there was not enough information to draw the conclusion that the high evaluations and

student comments signalled "an unusual and dramatic 'turn-around. I " In addition, Hall noted that Jiminez had not defended his dissertation and had "not produced much in the way of scholarly output. On this basis, Hall stated that he was recommending to Anderson that Jiminez be given a terminal contract and that the department would advertise and recruit candidates for Jiminez' position but Jiminez could reapply for his tenure track position at the end of the one year contract if he so desired. Hall went on to inform Jiminez

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obtained from the evaluations over

several semesters. In addition, he had not seen any discernible pattern indicating that student evaluations of African-American professors were lower than those for white professors (Test. of Hall).

30. Some students also approached Anderson during this time frame, informing him of their concerns that Jiminez had been the victim of collusion on his evaluations and that the student action might have been racially motivated. (Test. of Laura Kasley, Nicole Dixon and Anderson). Anderson found the students to be credible, but he did not conduct an investigation into the matter.

31. Under MWC's student evaluation policy, faculty are not permitted in class during the student ratings.

However, it is inconsistent with school policy for students to confer with one another while filling out the evaluations. (Test. of Anderson).

32. Jiminez' student evaluations for the Spring 1992 semester were dramatically higher than his previous evaluations and were, in fact, higher than the department averages. (Test. of Jiminez and Hall; Defs. I Ex. 22; Pl. Is Ex. 15). Jiminez, Fall 1992 evaluations were slightly under the department average but higher than the scores he received during his f.i-rst five semesters. His Spring 1993 evaluations were back above the department average. (Test. of Hall; Defs.1 Ex. 22). Rycroft testified that he had never seen a faculty member's evaluations go from being consistently

low to being above average or average as was the case with Jiminez. (Test. of Rycroft). The Court finds that the higher evaluations Jiminez received in his sixth, seventh and eighth semesters offer

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spread, Hall and Anderson received numerous letters from students supportive of Jiminez. (Pl.'s Ex. 23). The letters on the whole spoke positively of Jiminez' teaching ability and the manner in which he worked with students. Some of the letters also noted that some students had "collaborated" to give Jiminez low evaluation scores

and had made the evaluation process a collective effort. One letter ref erred to "bigotted [sic] student evaluations, " (pl. , s Ex. 23-18), and another stated, "To deny (Jiminez] a contract renewal because a few people cannot see beyond his color or accent is a crime and blatant discrimination." (Pl.'s Ex. 23-19). Another student expressed the "opinion that there is considerable doubt as to the validity of the evaluations from (her] class." (Pl.'s Ex. 23-21).

29. On April 28, 1992, a group of six students visited Hall. These students also were supportive of Jiminez and they informed Hall that they believed there had been a collusive effort by some students to mark Jiminez

down on evaluations based on his race and accent. Hall took notes during this meeting in which he recorded the "students' perceptions." His notes mention that "class was a zoo because the students gave him hell," 11(s]tudents came in with bad attitudes," and then later: "Race. Accent. Mannerisms. Students here are not tolerant." (Test. of Hall; Pl.'s Ex. 27). Hall stated that he accepted as true what the students said. The students asked Hall to conduct an investigation, but Hall did not do so. Hall stated that he discounted the likelihood that the collusion was extensive enough to markedly affect the information

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(Test. of Rycroft). While Rycroft acknowledged in the evaluation that Jiminez had strengths as a teacher, Rycroft stated that the most weight must be put on "in the classroom" teaching and that Jiminez had not met the MWC standard in this regard. Rycroft stated that Jiminez, record of service for the year was good. With respect to scholarship/professional activity, Rycroft focused on the fact that Jiminez had not completed his dissertation. In summary, Rycroft stated, "(T]eaching and professional activity remain areas of significant weakness as they have been in the past," and added that "the department must recommend a one year

terminal contract.,,

26. The decision to recommend to Hall that Jiminez be given a terminal contract was reached unanimously by all three tenured members of the Department of Economics: Rycroft, Greenlaw and Steve Stageburg. (Test. of Rycroft and Greenlaw).

27. On March 30, 1992, Carole Corcoran, a tenured faculty member in the Department of Psychology sent Hall a letter. (Pl.'s Ex. 13). In the letter, Corcoran noted her disappointment over the fact that the Department of Economics had recommended giving Jiininez a terminal contract and advised Hall that a student had expressed "anger at the disrespect shown by some white students toward (Jiminezj." Corcoran also mentioned to Hall that "racism,

however subtle,, has to be taken into account when..... examin [ing] student and f aculty evaluations of C Jiminez (Pl. I s Ex. 13).

28. As word of the Department of Economics, recommendation

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candidate is thorough. At this time, candidates generally get either a three-year contract taking them up to their "tenure decision year," or a one-year terminal contract. (Defs.' Ex. 8; Test. of Hall and Rycroft).

22. On December 20, 1991, Mehrabi was suspended from his position as departmental chair and Rycroft was appointed acting chair. (Test. of Mehrabi, Hall and Rycroft).

23. Daniel Abel, a faculty member in the Department of Biological Sciences at MWC, sat in on several of Jiminez' environmental economics classes during the Fall 1991 semester. On January 25, 1992, Abel wrote Rycroft a letter advising him of this fact and relating a positive critique of Jiminez, teaching. (Test. of Abel; Pl.'s Ex. 8).

24. In February 1992, Rycroft sent a draft of Jiminez, annual evaluation to Hall. Hall suggested a "slight re-write of the first paragraph" -and stated, "On the whole I think you have done an excellent job on this, Bob. It strikes just the right tone." (Pl.'s Ex_. 10; Test. of Jiminez, Hall and Rycroft). Rycroft incorporated Hall's re-write into the final evaluation which wasdated February 26, 1992. (Pl.'s Ex. 9; Defs.1

Ex. 9).

2 5 . In this evaluation, Jiminez, third annual evaluation, Rycroft noted Jiminez, "perennially low" course evaluation scores and stated that "comments on course evaluation forms, as well as oral comments solicited by the chair from selected students, have

been mainly critical.-' (Pl - 's Ex. 9; Def s - Ex. 9) -Rycroft Solicited comments from five students, all of whom were white.

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is bound to have. -I Rycroft then listed positive aspects of Jiminez' teaching and noted that he

"expect(ed] great things (from Jiminez I in the future." With respect to scholarship/prof essional activity, Rycroft stated that Jiminez' "major focus for the immediate future must be completion of his dissertation. (Def s. Ex. 6).

19. Jiminez was given a second contract of employment covering academic years 1990-91 and 1991-92. His next annual evaluation was performed by Shah Mehrabi, then the departmental chair, on April 2, 1991. Mehrabi noted Jiminez, "below average" student evaluation scores but qualified his statement by adding that "with experience and once students get accustomed to (Jiminez'] style of teaching, (jiminez, evaluations] should improve.,, Mehrabi did not note any criticisms of Jiminez' scholarship/professional activity or service. (Defs.1 Ex. 7).

20. During the Spring semester of 1991, Jiminez invited Rycroft to attend,

unannounced, any of Jiminez' classes to observe and critique his classroom performance. Rycroft accepted the invitation but never attended any of Jiminez' classes. (Test. of Jiminez and Rycrof t) . In fact, none of the Department of Economics faculty members attended any of Jiminez' classes in an attempt to monitor his progress or offer help. (Test. of Jiminez).

21. On December 10, 1991, near the end of Jiminez' fifth

semester of teaching, Hall wrote departmental chair Mehrabi to

remind him that Jiminez I third year review should be done. (Def s. I

Ex. 8). Under MWC practice, the third year review of a tenure

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14. During his four-year stint at MWC, Jiminez did not publish in a peer-refereed journal. (Test. of Jiminez).

15. Greenlaw, like Jiminez, did not publish in a peer-refereed journal before his fourth year at MWC. Greenlaw).

(Test. of

16. Professors and the courses they teach are evaluated every

semester by the students in the respective courses. These

evaluations are done on forms titled "Student Course Reaction

Questionnaire.,, (Defs.1 Ex. 11). In his first semester at MWC,

the Fall 1989 academic semester, Jiminez received student evaluations which ranked 37th out of the 41 tenure track faculty members. For the four semesters from Spring 1990 through Fall 1991, Jiminez' student evaluations were the lowest of the approximately 40 tenure track faculty members. (Test. of Hall). During these five semesters, Jiminez' evaluation scores were below the Department of Economics average evaluation scores. 22).

(Def s. ' Ex.

17. Greenlaw has received student

evaluations which are

consistently above the Department of Economics average. (Test. of Greenlaw).

18. As noted in Iff 8, f aculty members are given a written evaluation yearly by their departmental chair. Jiminez I first evaluation was written by Rycroft on February 20, 1990. Rycroft noted that the "numerical scores on [Jiminezl] student course ratings were f airly low" and mentioned some student criticisms, but added that the areas criticized were "shortcomings any new teacher

(Test. of

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f aculty and administrators at which Anderson, s . taff and faculty members, and students spoke about their concerns over the racial climate at MWC. (Test. of Anderson and Carole Corcoran; Pl.'s Ex. 14). Years prior to this, concerns

had been voiced to Hall and Anderson that some students were giving f aculty member Karen Williams negative evaluations based on her race. (Test. of Hall and Brenda Sloan). In approximately 1986 or 1987, on the basis of affirmative action concerns, MWC commissioned a study to an outside consultant, Sharon Friesz. Friesz I report indicated that MWC needed to implement some type of sensitivity training. (Test. of

Brenda King). Such training was implemented in 1992. (Test. of Sloan).

-C. Jiminez I Evaluations and Eventual Receipt of Termina..-- Contract

12. When Jiminez applied for

employment with MWC on March 4, 1989, he wrote on his application: "PhD in Economics expected June 1989. (Def s. I Ex - 1) . However, Jiminez actually did not complete the requirements for receiving his Ph.D. from the University of New Mexico until approximately August 1992, (Pl. Is Ex. 21), after being taken off the tenure track and given a one-year terminal contract by MWC.

13. Steven Greenlaw, a tenured professor in the Economics Department at MWC who is white, did not receive his Ph.D. until his fourth year at MWC. Despite being told that he would lose his job if he did not get his Ph.D. before the end of his first year, Greenlaw was allowed to remain and subsequently received tenure. (Test. of Greenlaw).

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Service to the college is measured based on factors such as academic advising, club sponsorship, service on committees, and role in college governance. Promotion and tenure decisions are made based upon a f aculty member I s perf ormance as measured by these three criteria. (Defs.1 Ex. 5).

8. Faculty members are given a written performance evaluation yearly by their departmental chair. (See, e.g., Defs.1 Exs. 6, 7, 9).

B. Racial Setting at MWC

9 . The student body at MWC is comprised primarily of white students. President Anderson testified that when he became

president in 1983, minority students represented only about three percent (3%) of the student population. Now, this figure has jumped to approximately twelve percent (12%). (Test. of Anderson) - 10. As of the Fall semester in 1989 (when Jiminez began his appointment at MWC), MWC "employed a total of 148 full time tenured/tenure-eligible, and 18 non-tenure eligible faculty members. of these[,] Black faculty tenure/tenure-eligible members were 6, and 2 were non-tenure-eligible.11 (Defs.1 Ex. 20).

ii. In the years preceding Jiminez' arrival, as well as during his stint at MWC, there was a climate of racial tension at MWC. Instances occurred which openly manifested an atmosphere of

racism and intolerance. For example, during academic year 1991-92 three African-American students received a death threat over the telephone. (Test. of Anderson; Pl.'s Ex. 14). Shortly after this threat, in January 1992, a gathering was held for MWC students,

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S. The Department of Economics conducted a national search when it sought to fill the tenure-track position for which Jiminez was ultimately hired. Three candidates, including Jiminez, were invited to MWC for an interview. Though the members of the Department of Economics recommended by a 3-2 vote that

Jiminez be hired, they did not view Jiminez as the most qualified candidate of the three. However, they wanted to hire him because he met their requirements and they wanted to diversify the faculty. (Test. of Rycroft and Greenlaw).

6. A tenure-track professor at MWC usually has to go through three contract phases prior to being considered for tenure -- an initial one-year appointment, a two-year contract, and a three-year contract. (Test. of Hall; Defs.1 Ex. 5 at S 2.2-2).

7. At the time that Jiminez started his employment with MWC, the 1982 version of the MWC Faculty Handbook ("Handbook"), as amended over a period of years, was in effect. The Handbook was revised in 1990. (Test. of Hall;

Defs., Exs. 4, 5). According to the Handbook,. faculty performance is evaluated in three areas: teaching, scholarly/creative/professional activity, and service. Teaching effectiveness is measured based on a variety of factors, including evaluations by students, colleagues, the department chair and the professor (self-evaluation), attainment of course outcome objectives, and maintenance of academic standards. Professional activity/scholarship is evidenced by scholarly publication, presentations of papers and addresses before audiences of professional peers, and similar evidence of scholarly endeavors.

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primarily undergraduate education in liberal arts and sciences. College policy and programs are set by a Board of Visitors. The chief executive of MWC is the President, William Anderson ("Anderson"), who is appointed by and responsible to the Board of Visitors.

3. Defendant Philip Hall ("Hall") is currently Provost of MWC, having assumed that position in July 1993. From July 1985 until July 1993, Hall served as Dean and Vice-President for Academic Affairs. (Test. of Hall).

4. iiminez applied for a tenure track position as a member of the faculty of the Department of Economics at MWC by application dated March 4, 1989. (Defs.1 Ex. 1). As part of his application

process, Jiminez interviewed with Hall. The menlbers of the Department of Economics voted 3-2 in favor of recommending to Hall that Jiminez be hired. (Test. of Steven Greenlaw and Robert Rycroft). Hall then approved this recommendation and carried it forward to Anderson who in turn carried it to the Board of Visitors. (Test. of Hall). On August 3, 1989, Anderson sent a letter to Jiminez notifying him that the Board of Visitors had taken the following action on his behalf:

> RESOLVED By The Rector and Visitors of Mary Washington College that Anthony E. Jiminez be, and he hereby is, elected to the faculty of Mary Washington College, in a full-time, tenure

track position of Assistant Professor in the Department of Economics, to teach Economics for a one-year contractual period, beginning August 16, 1989 and ending May 15, 1990, at an annual salary of $29,500, contingent upon your being granted the terminal degree by August 16, 1989.

(Defs.1 Ex. 2).

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ANTHONY E. JIMINEZ,

Plaintiff,

Richmond Division

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RICH,?ACND, VA

V.

C.A. No. 93-459

MARY WASHINGTON COLLEGE, et al,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter is before the Court for resolution following a bench trial conducted on February 14-15, 1994. The Court makes the following Findings of Fact and Conclusions of Law, pursuant to Fed.

R. Civ. Proc. 52:

I. FINDINGS OF FACT

A. Jiminez' An at WC and the

i inez Appointment at MWC and the Faculty Evaluation Process 1. Plaintiff Anthony E. Jiminez ("Jiminez") is a citizen of Trinidad of African born descent. He has filed this suit pursuant to 42 U.S.C. SS 1981 and 1983 and Title VII of the Civil Rights Act

of 1964, as amended, 42 U.-S.C@..

. as amended, 42 U.-S.C@.. SS 2000e to 2000e-17, alleging discrimination in employment on the basis of race and national origin. Jiminez timely filed a charge of discrimination with the Equal Employment

Opportunity Commission on October 2, 1992, and on March 31, 1993 received a Notice of Right to Sue letter. (pl.'s Exs. 28, 29). This suit was filed on June 29, 1993.

2. Defendant Mary Washington College ("MWC") is a college funded and operated by the Commonwealth of Virginia, offering

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Let the Clerk send a copy of this Interim Order and the accompanying Findings of Fact and Conclusions of Law to all counsel of record.

DATE

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SENIOR UNITED STATES DISTRICT J-UDGE

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you've heard all the evidence, Your Honor, you will see that while it may be unfortunate to Mr. Jiminez, it was the right decision to make. It was consistent with tenure criteria that were published. It was consistent with expectations. It was consistent with good college management. For that reason we think the evidence will show that this complaint has no merit.

Thank you, Your Honor.

THE COURT: Thank you.

Call your first witness, Mr. El-Amin.

MR. EL-AMIN: Brenda Sloan.

BRENDA SLOAN

was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. EL-AMIN:

Q Good morning, Ms. Sloan. How are you?

A Good morning.

Q Would you state your full name, please.

A Brenda D. Sloan.

Q And by whom are you employed, Ms. Sloan?

A Mary Washington College.

Q And what is your position at Mary Washington

College?

A I'm special collections librarian.

Halasz & Halasz

Q And how long have you been employed at Mary Washington College?

A Since January of 1982.

Q All right. And are you an academic appointment? Do you have an academic appointment? Are you considered faculty?

A Administrative faculty.

Q Administrative faculty?

A Right.

Q And for the record, your race?

A African-American.

Q All right. Now Ms. Sloan, were you ever the -- was there ever a black faculty staff

association

created at Mary Washington College?

A Yes. I was one of the founding members of that association and cochair in 1986.

Q 1986. And how long did you stay at cochair?

A To 1990. And then from 1990 to 1992 I was president of the association.

Q All right. And why was the association

created?

A Well, there were a lot of incidents going on on campus that involved the African-American community that we felt should be addressed.

Q Such as?

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A There were people who had come to us about being harassed in the physical plant.

MR. HORSLEY: objection, Your Honor. This is going to be a continuing objection.

THE COURT: She isn't offering it for the truth. It's background information on why the black faculty association came to be.

MR. HORSLEY: Her testimony relates to a period of time before Mr. Jiminez was ever hired by the college.

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THE COURT: All right.

BY MR. EL-AMIN:

Q Go ahead. What were the other reasons for creating the association?

A Well, we were also concerned with the recruitment; getting more black faculty staff on campus. ',@e were involved with not only the faculty and staff, but the concerns of our African-American students. We wanted to be able to assist administrators in trying to recruit black students and black faculty. And we also served as a networ@: in which we were a support network for each other because there were only a handful of us there, and we felt we needed this network.

Q All right. In terms of percentages, would you

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indicate whether the black faculty represented -- was that less than -- was it more than 10 percent of the faculty or less?

A Less. At that time.

Q All right. Now did you present your group to Dr. Hall and Dr. Anderson?

A Yes. We met on a --

sometimes monthly basis.

Like, it was, like, a forum that members of the black

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faculty staff would come and address concerns that we had.

Q And what was your experience in respect to Dr. Anderson and Dr. Hall's receptivity to the concerns and your organization?

A well, in one of our meetings we were told by Dr. Anderson that there was some faculty members on our campus that considered our group an adversarial organization.

Q All right.

A Of course, my response at that time was, What

was your response to them.

Q What did he say?

A He didn't answer. So my response was, Well, I suppose when they made that negative comment about us and you didn't respond, that was like telling them that yes, they are.

Q Did he seem to be opposed to the organization

(It0026

as a group? Did he appear to have any opposition to it or express any opposition?

A He never told us that he had any opposition to it, but when we would take concerns, it took a while to get them

addressed, and it was a lot of red tape. And we were -- you know, we were asked that you address a particular dean or a particular department, and it would just take so very long to get correspondence answered. And a lot of our meetings were canceled an hour or two before we were supposed to meet, so we got the impression that we weren't really important.

Q All right. Did there -- and what about Dr.

Hall; did you have to interface with him as dean and

president and vice president for academic affairs?

A He met with our group several times when we

had concerns that -- see, what they would do is bring i. n

those people in the departments where

we had a concern. SC when we had a

concern about teaching faculty and promotions and mentoring programs and student evaluations, we would bring in Dr. Hall. He would come, and, you know, we would discuss things with him.

Q And in terms of implementing some of the ideas and concerns that you have, how did you find Dr. Hall? How was his receptivity to your concerns?

A Well, we got the impression that, you know,

(illegible)

what we would do comb the chronicles of higher education to find out what other schools were doing that had black faculty and Xerox articles and make things available to them. And, you know, sometimes our response would be, Well, you know we can't violate academic freedom; we r-an't force people to do things. And the only thing we were.asking, you know -- we would also maintain the direction would have to come from the top. And if they don't get directions from the dean and the president, then things would go on as usual.

Q And over this course of, say, 1986 to 1992, did you feel -- what was your impression in respect to them being

proactive in terms of presenting the kind of atmosphere that you thought was necessary to deal with racial climate? Was it good or bad?

A Well, it was not -- it was not very good because we would -- when we would come up with these suggestions, it would be -- for instance, like, at one point we came up with the suggestion for recruiting; that when various department heads would go out recruiting, that -- maybe professional meetings, that they would take a member of the black faculty staff so that we would, you know, show some type of concern that we wanted to recruit. And that was accepted, but it never was followed through on.

Q Whose responsibility would it have been?

Halasz & Halasz

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A I assume that because Phil Hall said that @,,e would do this. But the letter that went out to faculty - .nembers was not a letter saying, This is what I want you to do. It was saying, It would be wise if you did that. So to us that read, You do it if you want, you don't have to do it.

Q Now do you recall the incident involving student evaluations with Karen Williams?

A Yes, I do.

Q All right. Do you know -- what was the concern in respect -- was Dr. Williams black or white?

A She's African-American.

Q And what was some of the concerns raised by her situation? Do

you recall?

MR. HORSLEY: Objection. Again, your Honor, we're not trying Karen Williams' case, and we're not trying racial attitudes on campus. We're trying simple-discrimination case. My objection would be continuing.

THE COURT: You have a continuing objection. Proceed.

MR. EL-AMIN: All right.

BY MR. EL-AMIN:

Q Explain what you recall of the Karen Williams

af fair.

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A In one of our meetings that we had with Anderson -- and I don't know --

Dr. Anderson was always present, but I don't remember whether or not Phil Hall was there. But I remember that we did discuss negative student evaluations and the kinds of things that -- especially Karen's situation because she was a black female, and we thought that was a double whammy for her because the kinds of things she had to encounter that we did not feel that was happening to other women. For instance, she would -- every semester she was confronted by students wanting to know whether or not she had proper credentials to teach them. And we brought those concerns that that kind of foolishness should stop in the classroom where African-American faculty members are confronted by students in such a negative manner.

Q What was Dr. Anderson's response to that?

A I really don't remember, but nothing happened.

I don't think her department -- according to Karen and

meetings that we had -- she always kept us informed -- and nothing, she said, went back to the director of her department that something should be done about that and about the negative evaluations that she was beginning to receive about whether or not she was organized, whether or not she was competent, whether or not she was available and whether or not she knew that she was there because she was

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an affirmative action person.

Q Those were comments being made by students?

A Those are comments that Karen shared with us in a public meeting about the kind of things she had to encounter every semester. And every semester her evaluations got worse, and so our concern was for everybody. We wanted to correct it for everyone, and we were concerned that the school weighted student evaluations so heavily, especially unsigned student evaluations, which meant we felt students felt if they didn't have to sign it, they could say anything they wanted to. And we were concerned that the college -- some departments, I should say -- some departments would use those evaluations

and say, Well, it's obvious you're not an effective teacher. And we would bring those concerns because we thought they should do something about student evaluations counting so heavily because a lot of our members were receiving a lot of negative evaluations and some of them were just downright racist.

Q All right. Now did you -- was Dr. Hall and Dr. Anderson aware that you-all were bringing these concerns of racist evaluations to their attention?

A Yes. They were on our agenda almost every month.

Q Did you ever -- did Dr. Hall or Dr. Anderson

ever issue in writing indicating that that would not be

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tolerated?

A Well, they would say that.

Q Did they ever issue something to the department or to the students?

A We never saw it.

Q You never saw it?

A We never saw it.

Q All right. Were you looking for that to

happen?

Defendant's
Exhibit 11

MARY WASHINGTON COLLEGE
STUDENT COURSE REACTION QUESTIONNAIRE

Course Information: Discipline _____

Course Number_____ Suffix _____

Section _____ Date: _____

Instructor _____

As a teaching institution, Mary Washington is committed to the continued improvement of its courses of instruction. Students can play a role in this process by furnishing candid and honest reactions to the instruction they are receiving. This questionnaire gives you an opportunity to express anonymously your views concerning this course and the way it has been taught. The results of this questionnaire will be considered when personal decisions concerning this faculty member are made.

IN ORDER FOR YOUR EVALUATION TO BE TABULATED, ITEMS 1-5 MUST BE ANSWERED

1. My student status is: [ ](1) Freshman, [ ](2) Sophomore, [ ](3) Junior [ ](4) Senior [ ](5) Other

2. This course is [ ](1) In major and required, [ ](2) In major but not required, [ ](3) Not a major but required, [ ](4) Not in major or required.

3. The number of times I have been absent from this class is: [ ](1) 0 to 3, [ ](2) 4 to 6, [ ](3) 7 to 9, [ ](4) 10 or more.

4. My overall GPA is: [ ](1) 3.00 or greater, [ ](2) 2.00-2.99, [ ](3) 1.00-1.99, [ ](4) Less than 1.00, [ ] No GPA yet.

5. The grade I expect to receive in this course is: [ ](1) A, [ ](2) B, [

](3) C, [ ](4) D, [ ](5) F, [ ](6) Other (P.S. etc)

RESPOND TO EACH OF THE FOLLOWING STATEMENTS WITH THE RESPONSE NUMBER WHICH MOST ACCURATELY DESCRIBES YOUR REACTION TO THE STATEMENT, PLEASE USE THE "0" RESPONSE IF IT APPLIES.

(Use #2 Pencil) (0) Not applicable or don't know; (1) Strongly disagree; (2) Disagree; (3) Neutral, neither agree/disagree; (4) Agree, (5) Strongly agree.

6. [0] [1] [2] [3] [4] [5] The course material was presented in an organized manner.

7. [0] [1] [2] [3] [4] [5] Class time was used constructively.

8. [0] [1] [2] [3] [4] [5] The course material was covered at a pace that was neither too fast nor too slow.

9. [0] [1] [2] [3] [4] [5] The objectives for the course were clearly stated.

10. [0] [1] [2] [3] [4] [5] The professor was well prepared for class.

11. [0] [1] [2] [3] [4] [5] The professor helped to clarify difficult material in class.

12. [0] [1] [2] [3] [4] [5] The professor encouraged questions and/or expressions of opinions in class.

13. [0] [1] [2] [3] [4] [5] The professor aroused interest in the subject.

14. [0] [1] [2] [3] [4] [5] The professor was helpful when answering student questions.

15. [0] [1] [2] [3] [4] [5] The professor encouraged students to think.

16. [0] [1] [2] [3] [4] [5] The professor showed concern for student progress.

17. [0] [1] [2] [3] [4] [5] The professor maintained office hours.

18. [0] [1] [2] [3] [4] [5] The professor was available outside of class for help.

19. [0] [1] [2] [3] [4] [5] Assignment deadlines and/or major test dates were announced well in advance.

20. [0] [1] [2] [3] [4] [5] The tests reflected the important aspects of the course.

21. [0] [1] [2] [3] [4] [5] Assignments and/or tests were handed back within a reasonable length of time.

22. [0] [1] [2] [3] [4] [5] The professor made helpful comments on papers and/or tests.

23. [0] [1] [2] [3] [4] [5] The professor's criteria for grading were clear.

24. [0] [1] [2] [3] [4] [5] Please give this course an overall rating on a scale of one to five (five being the highest).

YOUR PROFESSOR MAY PROVIDE ADDITIONAL QUESTIONS TO BE ANSWERED AS ABOVE.

25. [0] [1] [2] [3] [4] [5]

26. [0] [1] [2] [3] [4] [5]

27. [0] [1] [2] [3] [4] [5]

28. [0] [1] [2] [3] [4] [5]

29. [0] [1] [2] [3] [4] [5]

Please use the back of this sheet to make written comments on the strong and weak aspects of the course or to elaborate on any of the questions above. Your comments will be read by the Dean,

the Department Chairperson and the Instructor.

Defendant's
Exhibit 1

COMMONWEALTH OF VIRGINIA
APPLICATION FOR EMPLOYMENT

Employees of the Commonwealth and applicants for employment shall be afforded equal opportunity in all aspects of employment without regard to race, color, religion, political affiliation, national origin, handicap, sex or age.

1. Position applied for: Assistant Professor of Economics.

2. Agency: Mary Washington College.

3. Social Security No.: 293-68-5144.

(NOTE: Completion of number three is optional. Failure to submit social security number on this form will not prohibit employment consideration. Social Security Number may be required on other forms prior to employment.)

4. Full legal name: Jiminez, Anthony Ernest.

5. Address: 205 Maple S.E. Apartment #T, Albuquerque, NM 87106.

6. Home Phone: (505) 247-4307

7. Business Phone: (505) 277-1953

8. Date of Birth: 4/15/50

(NOTE: The Age Discrimination in Employment Act of 1967 as amended prohibits discrimination of the basis of age with respect to individuals who are at least 40 years of age.)

9. Education

a. Circle highest grade completed:

1 2 3 4 5 6 7 8 9 10 11 12

Year Completed 1968

b. If you did not complete high school, do you have a high school equivalency diploma? __ Yes __ No Date Received_____

c. Circle number of years of post high school education 1 2 3 4 5 6 7

Name and Location of Institution

1. Youngstown State University, Youngstown, OH 44553

Hrs. 195

Degree Received BA (Cum Laude)

Major or Specialty Economics & Finance

Minor Accounting and Political Science

Dates Attended 1975-1982

2. University of New Mexico

Hrs. 72

Decree Received See (d) below

Major or Specialty Natural Resource Econ

Minor Applied Microeconomics and Math Economics

Dates Attended 1982-1989

d. If you expect to complete an educational program in the near future, please indicate what type of degree or program and expected completion date:

PhD in Economics Expected June 1989

10. Experience - Use Supplementary Experience Form(s) for additional space. Starting with the most recent, describe ALL paid, military and applicable voluntary experience. Highlight your knowledge, skills and abilities which best demonstrate your qualifications for this position. You may list significantly different jobs within the same organization as separate items. May we contact your present supervisor?

___Yes ___No

a. Job Title Teaching Associate

Employer University of New Mexico

Address Albuquerque, NM 87131

Phone (505) 277-5304

Type of Business University

Immediate Supervisor Dr. Ronald Cummings

Title Chairman-Economics Department

Salary (start) $840/mth (finish) $840/mth

Dates (mo/yr) 8/88 to (mo/yr) present

Full-time ___ Part-time ___ Hours/Week 8

Duties Teach Microeconomic Theory and Macroeconomic Theory at Both the Introductory and Intermediate Levels

Number and titles of employees you supervised 216 Students Currently

Equipment used _____

Reason for leaving Accepted Faculty Position at Mary Washington College

Your name if different from present _____

b. Job Title Teaching/Research Assistant

Employer University of New Mexico

Address Albuquerque, NM 87131

Phone (505) 277-5304

Type of Business University

Immediate Supervisor Dr. Ronald Cummings

Title Chairman-Economics Department

Salary (start) $450/mth (finish) $600/mth

Dates (mo/yr) 8/82 to (mo/yr) 5/88

Full-time ___ Part-time ___ Hours/Week 20

Duties Assist in Ongoing Research, Lecturing Examination Reviews, Examination Discussions and Grading for Microeconomic Theory at Both the Introductory and Intermediate Levels

Number and titles of employees (students) you supervised 90 per semester (on average)

Equipment used_____

Reason for leaving _____

Your name if different from present

_____

c. Job Title Management Trainee

Employer Reid's Shoe Factory

Address Pole # 148 Chinapoo Village, Laventille Rd., Port-of-Spain, Trinidad, WI

Phone _____

Type of Business Shoe factory

Immediate Supervisor Mrs. Margot Reid

Title Co-Owner

Salary (start) $1200/mth (finish) $1500/mth

Dates (mo/yr) _____ to (mo/yr) _____

Full-time ___ Part-time ___ Hours/Week __

Duties In Training to Oversee The Accounting Department

Number and titles of employees you supervised 10

Equipment used_____

Reason for leaving To Attend Graduate School

Your name if different from present

_____

e. Use this Space for any additional information you think would help us evaluate your application,

including training, seminars, workshops, special achievements or specialized skills _____

f. Automated word processing (specify equipment) _____
typing speed _____ words per minute.
Shorthand speed _____ words per minute.

g. License (to include driver's), certificate or other authorization to practice a trade or profession.
Type_____
License Number _____
Expiration date _____
Granted by (licensing board) _____

11. References

List names, addresses and relationships of three persons not related to you who know your qualifications: Dr. Ronald Cummings, c/o Economics Dept., University

of New Mexico, (505) 277-5304, my professor

Dr. Stuart Burness, c/o Economics Dept., University of New Mexico, (505) 277-5304, my professor

Dr. Albert Church, c/o Economics Dept., University of New Mexico, (505) 277-5304, my professor

12. Miscellaneous

a. Check which shift you will accept: ____ day ____ evening ___ night ___ Rotating ___ Weekends Specify shift hours _____

b. Check which job status you would accept ___full-time ___part-time (specify) _____

c. Check which employment status you'd accept: ___salaried (benefits) ___ hourly (no benefits) ___ part-time salaried (leave benefits only).

d. Are you willing to accept employment which requires you to travel? ___no ___yes. If yes, _____ during the day only, ___ occasionally overnight ___ frequently overnight.

e. List the geographic locations in which you are willing work. If anywhere in Virginia, write "all" Fredericksburg.

f. For purposes of compliance with The Immigration Reform and Control Act, are you legally eligible for employment in the United States? ___yes ___ no. Under the Immigration Reform and Control Act of 1986, you will be required to fill out a certification verifying that you are eligible to be employed and verifying your identify. Further, you will be required to provide documentation to that effect should you be employed.

g. Are you willing to provide your own transportation if necessary for your employment? ___ yes ___ no.

h. For purposes of compliance with Section 2.1-112 of the Code of Virginia have you ever served in the Armed Forces of the United States during the following dates? (check the appropriate dates): ___ World War I-4/16/17-4/1/20; ____ World War II-12/7/41-12/31/46; ___ Korean Conflict-6/27/50-1/31/55; ___ Vietnam Conflict-8/5/64-3/7/75; ___ None of the dates shown, but I did serve in the military.

i. Have you ever been convicted of a law violation(s), including moving traffic violations but excluding offenses committed before your eighteenth birthday which were finally adjudicated in a Juvenile Court or under a youth offender

law? ___ Yes ___ no. If yes, list all and explain.

13. When will you be available to start work? (No date is necessary if you are available as soon as you give two (2) weeks notice.) 8/21/89

14. CERTIFICATION- Each Application Requires Current Date and Original Signature.

I hereby certify that all entries on both sides and attachments are true and complete, and I agree and understand that any falsification of information herein, regardless of time of discovery, may cause forfeiture on my part to any employment in the service of the state of Virginia. I understand that all information on this application is subject to verification and I consent to references and former employers and

educational institutions listed being contacted regarding this application. I further authorize the Commonwealth to rely upon and use as it sees fit any information received from such contacts. Information contained on this application may be disseminated to other agencies, non-governmental organizations or systems on a need to know basis for good cause shown as determined by the agency head or designee.

Date 3/4/89 Applicant Signature

/s/ Anthony E. Jiminez

COURSE TOTALS FOR ECON 354 01 ****

JIMINEZ, ANTHONY

Number of Surveys 6

Student Status

FR: 0 SO: 0 JR: 6 SR: 0 Other:0

Course Relation to Major

MR: 0 MNR: 3 NMR: 0 NMNR: 3

Number of Absences

0-3: 2 4-6: 2 7-9: 2 10+: 0

Student Overall GPA

3-4: 3 2-3: 2 1-2:1 0-1: 0 NoGPA: 0

Student Expected Grade

A's: 5 B's: 0 C's: 0 D's: 0 F's: 0

Other 0

STUDENT REACTION SURVEY

Survey Statement/ Category	Frequency						Average (Exclude 0)
	0	1	2	3	4	5	
6	0	0	0	0	4	2	4.3
7	0	0	0	0	2	4	4.7

8	0	0	1	1	4	0	3.5
Totals	0	0	1	1	10	6	4.2
9	0	0	0	0	3	3	4.5
10	0	0	0	0	2	4	4.7
11	0	0	0	0	1	5	4.8
12	0	0	0	0	1	5	4.8
13	0	0	0	1	3	2	4.2
Totals	0	0	0	1	10	19	4.6
14	0	0	0	0	2	4	4.7
15	0	0	0	0	4	2	4.3
16	0	0	0	0	0	6	5.0
17	1	0	0	0	2	3	4.6
18	2	0	0	0	1	3	4.8
Totals	3	0	0	0	9	18	4.7
19	0	0	0	0	2	4	4.7
20	0	0	0	0	0	6	5.0
21	0	0	0	0	2	4	4.7
22	0	0	0	1	2	3	4.3
23	0	0	0	1	2	3	4.3
Totals	0	0	0	2	8	20	4.6

Summary

24	0	0	0	0	3	3	4.5
25	0	0	0	0	0	0	0.0
26	0	0	0	0	0	0	0.0
27	0	0	0	0	0	0	0.0
28	0	0	0	0	0	0	0.0
29	0	0	0	0	0	0	0.0
Totals	0	0	0	0	0	0	0.0

Totals (Excluding 25-29)

3	0	1	4	40	66	4.5

00421

COURSE TOTALS FOR ECON 202B 02 ****

JIMINEZ, ANTHONY

Number of Surveys 16

Student Status

FR: 8 SO: 3 JR: 3 SR: 0 Other:2

Course Relation to Major

MR: 5 MNR: 0 NMR: 6 NMNR: 5

Number of Absences

0-3: 10 4-6: 3 7-9: 2 10+: 0

Student Overall GPA

3-4: 7 2-3: 8 1-2:0 0-1: 0 NoGPA: 0

Student Expected Grade

A's: 6 B's: 7 C's: 2 D's: 0 F's: 0

Other 1

STUDENT REACTION SURVEY

Survey Statement/ Category	Frequency						Average (Exclude 0)
	0	1	2	3	4	5	
6	0	0	0	1	9	6	4.3

7	0	0	0	2	6	8	4.4
8	0	1	2	4	6	3	3.5
Totals	0	1	2	7	21	17	4.1
9	0	0	1	3	7	5	4.0
10	0	0	0	2	6	8	4.4
11	0	0	0	3	7	6	4.2
12	0	0	0	2	3	11	4.6
13	0	0	1	7	5	3	3.6
Totals	0	0	2	17	28	33	4.2
14	0	0	0	3	8	5	4.1
15	0	0	0	2	6	8	4.4
16	1	0	0	1	6	8	4.5
17	5	0	0	3	4	4	4.1
18	4	0	0	2	3	7	4.4
Totals	10	0	0	11	27	32	4.3
19	0	0	0	0	5	11	4.7
20	0	0	1	0	7	8	4.4
21	0	0	0	0	3	13	4.8
22	2	0	0	5	5	4	3.9
23	0	0	0	0	7	9	4.6

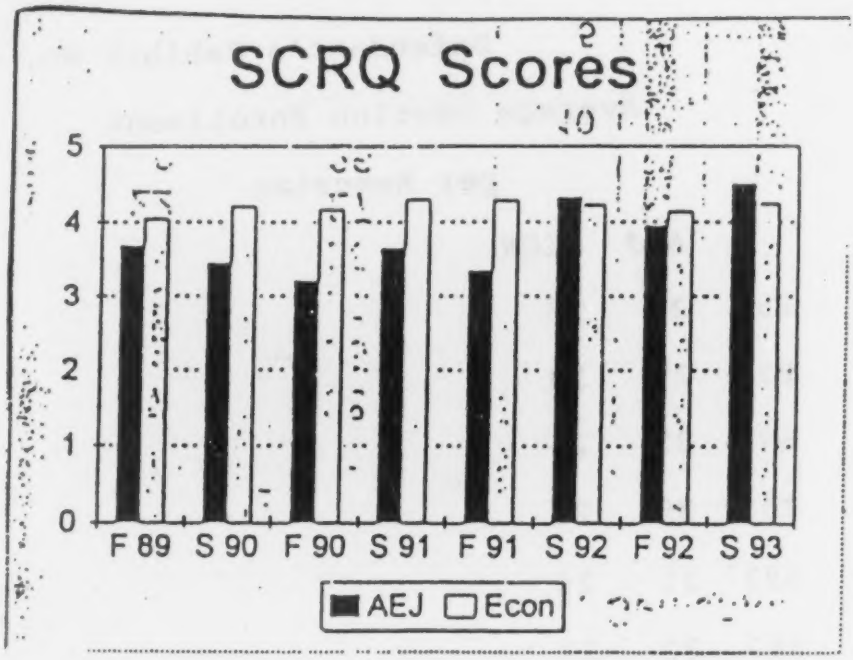
Totals	2	0	1	5	27	45	4.5
Summary							
24	0	0	0	5	5	6	4.1
25	0	0	0	0	0	0	0.0
26	0	0	0	0	0	0	0.0
27	0	0	0	0	0	0	0.0
28	0	0	0	0	0	0	0.0
29	0	0	0	0	0	0	0.0
Totals	0	0	0	0	0	0	0.0
Totals (Excluding 25-29)							
	12	1	5	45	108	133	4.7

Defendant's Exhibit
No. 22

Student Course Reaction Questionaires

	Org AEJ	Org Econ	Clas AEJ	Clas Econ	Rel AEJ	Rel Econ
F89	3.6	4.1	3.7	4.1	3.9	4.1
S90	3.1	4.2	3.5	4.2	3.8	4.3
F90	3.0	4.2	3.2	4.2	3.7	4.3
S91	3.3	4.3	3.7	4.4	4.0	4.3
F91	3.3	4.3	3.3	4.4	3.6	4.3
S92	4.2	4.3	4.3	4.3	4.4	4.2
F92	4.0	4.2	4.0	4.2	4.1	4.2
S93	4.5	4.3	4.5	4.3	4.7	4.3

	Assn AEJ	Assn Econ	Sum AEJ	Sum Econ	Avg AEJ	Avg Econ
F89	3.9	4.0	3.3	3.9	3.68	4.04
S90	3.6	4.2	3.2	4.1	3.44	4.20
F90	3.3	4.1	2.8	4.0	3.20	4.16
S91	3.8	4.3	3.4	4.2	3.64	4.30
F91	3.5	4.1	3.0	4.3	3.34	4.28
S92	4.5	4.2	4.2	4.1	4.32	4.22
F92	3.9	4.1	3.7	4.0	3.94	4.14
S93	4.4	4.2	4.4	4.1	4.50	4.24



Defendant's
Exhibit No. 22

Defendant's Exhibit No. 23

Average Section Enrollment

per Semester

	AEJ	ECON
S90	27	23
F90	27	28
S91	23	26
F91	25	27
S92	11	26
F92	22	27
S93	9	26

